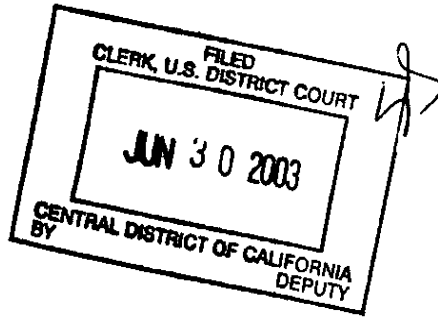


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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

STEVEN W. SUTCLIFFE,

Petitioner,

vs.

UNITED STATES DISTRICT COURT,
 CENTRAL DISTRICT OF
 CALIFORNIA, ATTORNEY GENERAL
 OF THE UNITED STATES,

Respondents.

CASE NO. CV 03-02810 MMM (AJW)

ORDER MODIFYING AND ADOPTING
 REPORT AND RECOMMENDATION OF
 UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1)(C), the court has reviewed the entire record in this action, the Report and Recommendation of United States Magistrate Judge Andrew J. Wistrich, and the objections thereto. Based on its review, the court has made a *de novo* determination of those portions of the report to which objections were directed, and adopts the findings, conclusions and recommendations of the Magistrate Judge with the modifications set forth herein:

A. Discussion

In his objections, petitioner challenges Judge Wistrich's finding that Judge Matz's April 7, 2003 order amended Judge Matz's earlier March 14, 2003, order. It is the March 14, 2003, order that is the subject of this action. Petitioner contends that, even assuming the April 7, 2003,

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1 order cured any defect in the March 14, 2003, order, the March order was unconstitutional when
 2 issued, and the court should enter an order so stating. The court adopts Judge Wistrich's
 3 recommendation that the petition be dismissed on a ground different than that stated in the Report
 4 and Recommendation, i.e., that the court lacks subject matter jurisdiction to hear the petition.

5 The instant petition was filed on April 22, 2003. As is evident from the record in *United*
 6 *States v. Steven William Sutcliffe*, CR 02-350-1 AHM, as of April 22, 2003, petitioner was
 7 detained pursuant to Judge Matz's April 7, 2003, order. That order stated that petitioner was to
 8 be committed to the custody of the Attorney General of the United States for a period of four
 9 months based on the court's determination that he was presently suffering from a mental disease
 10 or defect that rendered him mentally incompetent to understand the nature and consequences of
 11 the proceedings against him or to assist properly in his defense.

12 28 U.S.C. § 2241 requires that a person be "in custody" pursuant to the sentence or order
 13 he challenges. The "in custody" requirement is jurisdictional (*Maleng v. Cook*, 490 U.S. 488,
 14 490-91 (1989); *Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) ("[T]he 'in custody'
 15 requirement is jurisdictional"), and custody is determined as of the date the habeas petition is
 16 filed. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 238-40
 17 (1968). See also *Lopez v. Heinauer*, __ F.3d __, 2003 WL 21347122, * 1 (8th Cir. June 11,
 18 2003) ("We first note that the 'in custody' requirement of the habeas statute is satisfied as long
 19 as the petitioner was in custody at the time he filed his habeas petition"). For this reason, a
 20 person cannot avail himself of the habeas remedy if he is not in custody on the challenged order
 21 at the time the petition is filed. See *Miranda v. Reno*, 238 F.3d 1156, 1158-59 (9th Cir. 2001)
 22 (holding that a petitioner who had already been deported as of the date he filed a habeas petition
 23 was not "in custody" and could not seek relief). Compare *Zegarra-Gomez v. Immigration and*
 24 *Naturalization Service*, 314 F.3d 1124, 1126-27 (9th Cir. 2003) (holding that the action of a
 25 petitioner who was in INS custody on the date he filed his petition, was not moot, despite his
 26 subsequent deportation, because of the collateral consequences of the deportation order).

27 Here, Sutcliffe was not "in custody" pursuant to the March 14, 2003, order on the date
 28 he filed the instant petition. Rather, by that date, he was "in custody" pursuant to the April 7,

2003, order. Compare *Bacon v. United States*, 449 F.2d 933, 935 (9th Cir. 1971) (“When she filed her habeas corpus petition Bacon was in custody solely because of the order she now challenges. Since that time the contempt order has added a second basis for holding Bacon, but neither the Government nor the District Court has indicated that the original order has lost its force. Bacon challenges an order under which she is presently being detained. Accordingly, the court lacks subject matter jurisdiction to hear his challenge to the March order”).

To the extent subject matter jurisdiction existed, the court concurs with Judge Wistrich that the petition is moot. To the extent there was any error in the March 14, 2003, order, the detention Sutcliffe “incurred as a result of that action [was] . . . over [as of the date he filed the habeas petition], and [could not] be undone.” *Spencer, supra*, 523 U.S. at 8. Moreover, Sutcliffe has identified, and will suffer, no collateral consequences as a result of the March 14, 2003, order. *Id.* at 7. Compare *Bacon, supra*, 449 F.2d at 936 (holding that the habeas petition of a material witness, who was arrested and taken to Seattle pursuant to court order, was not moot, despite the fact that she was then being incarcerated on a separate contempt order, because, if the contempt order were to be dissolved, “she remain[ed] subject to possible custody at least in part under the authority of the order that she attack[ed]” while she completed her testimony before the grand jury, and “the possibility of her future detention under that order provides a sufficient collateral consequence”).¹

¹The case does not fall within the narrowly applied exception that permits review of decisions, otherwise moot, that are “capable of repetition, yet evading review.” The Supreme Court has directed that this doctrine be applied only in “exceptional situations.” *Spencer, supra*, 523 U.S. at 17 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). To fall within the exception, a petitioner must demonstrate that two circumstances are present: “(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Id.* (internal quotations omitted) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990), *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam), and *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Here, while Sutcliffe’s claim may arguably satisfy the first of these criteria, there is no evidence that it satisfies the second, i.e., there is no evidence that Sutcliffe will be committed a second time for further evaluation by Judge Matz. Any suggestion that he will, moreover, would be purely speculative. See *Van Wie v. Pataki*, 267 F.3d 109, 114 (2d Cir. 2001) (“We find additional support for this approach in the

1 **B. Conclusion**

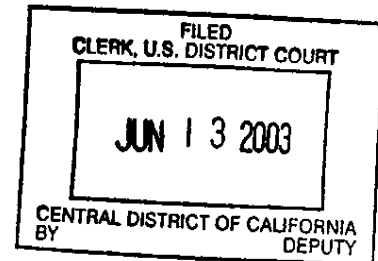
2 For the reasons stated, IT IS ORDERED that judgment be entered denying the petition
3 for writ of habeas corpus and dismissing the action without prejudice.

4 The Clerk is directed to serve copies of this Order and the attached Report and
5 Recommendation of United States Magistrate Judge on the parties by United States mail.

7 DATED: June 27, 2003


MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

18 many Supreme Court cases which have rejected the application of the 'capable of repetition, yet
19 evading review' exception in the face of the complaining party's speculative and theoretical
20 assertion that the issue in dispute was capable of repetition. . . . Additionally, this Court recently
21 explained that 'mere speculation that the parties will be involved in a dispute over the same issue
22 does not rise to the level of a reasonable expectation or demonstrated probability of recurrence.'
23 . . . Applying this standard, we find that the second criterion of this exception to the mootness
24 doctrine is not met in this case. . . . [Plaintiffs'] assertion amounts to a mere theoretical
25 possibility that the controversy is capable of repetition. . . . Such speculation does not establish
26 'a reasonable expectation' that they will again be subjected to the same dispute. This appeal does
27 not fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine.
28 We therefore dismiss the appeal as moot"); *Russman v. Board of Education of Enlarged City
School District of City of Watervliet*, 260 F.3d 114, 120 (2d Cir. 2001) (" . . . Although a plaintiff
need not show a 'demonstrated probability' of recurrence, there must be at least a 'reasonable
expectation' of repetition. . . . To create a reasonable expectation of recurrence, repetition must
be more than theoretically possible. '[M]ere speculation that the parties will be involved in a
dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated
probability of recurrence'").



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

STEVEN W. SUTCLIFFE,)	
)	
Petitioner,)	No. CV 03-2810-MMM(AJW)
)	
v.)	REPORT AND RECOMMENDATION
)	OF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT)	
CENTRAL DISTRICT OF CALIFORNIA,)	
ATTORNEY GENERAL FOR THE UNITED)	
STATES,)	
)	
Respondents.)	

Background

Petitioner, who is represented by counsel, filed this petition pursuant to 28 U.S.C. § 2241 on April 22, 2003. It is one of three habeas petitions filed by petitioner in this Court.

All three of petitioner's habeas petitions arise out of events that have occurred in a federal criminal case pending in this Court in which petitioner is a defendant. [See United States v. Steven William Sutcliffe, CR 02-350-1-AHM]. In that federal criminal case defendant is charged with four counts of transmitting threats (18 U.S.C. § 875(c)) and five counts of transferring social security numbers with

1 the intent to aid and abet identity fraud (18 U.S.C. § 1028(a)(7)).

2 This petition alleges that petitioner is being illegally detained
3 for treatment pursuant to 18 U.S.C. § 4241(d) because the Court in
4 petitioner's federal criminal case did not make a finding of
5 incompetence. [Petition at 3]. Respondent filed a response to the
6 petition, and petitioner filed a reply.

7 On January 17, 2003, the Court in petitioner's federal criminal
8 case issued an order requiring petitioner to submit to a psychiatric
9 evaluation to determine his competency to stand trial pursuant to 18
10 U.S.C. § 4241(a), and directed that a post-evaluation report be
11 prepared and provided to the Court and the parties. [January 17, 2003
12 Order].¹ As explained in the January 17, 2003 Order, the Court
13 concluded that several factors warranted a competency evaluation,
14 including:

15 (1) petitioner had "displayed an apparent inability or refusal to
16 consult with counsel with a reasonable degree of rational
17 understanding," as evidenced by, among other things, petitioner's
18 requests to terminate his representation by three attorneys, because
19 of a total breakdown in communications between him and them (a
20 characterization with which the attorneys agreed), and the allegations
21 by two of petitioner's appointed attorneys that petitioner had
22 threatened them; and

23 (2) petitioner had "displayed an apparent inability to understand
24

25
26 ¹ Most of the following facts are obtained from documents and orders
27 filed in petitioner's criminal case. The Court takes judicial notice of the
28 contents of that official court file. See Fed. R. Civ. P. 201; Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994); Emirch v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir. 1988); Mack v. South Bay Beer Distributors Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

1 (rationally and factually) the proceedings against him," as evidenced
2 in part by petitioner's statement in open court "that he does not
3 understand the charges," petitioner's suggestion that he is "not
4 properly subject to prosecution because his true legal name is not
5 Steven William Sutcliffe, but instead is 'Steve-William: of the
6 Sutcliffe....'" [January 17, 2003 Order].

7 After holding a hearing on petitioner's competency on March 14,
8 2003, the Court issued an order noting that (a) in a report prepared
9 pursuant to the Court's order, Dr. Rushton Backer opined that
10 petitioner was competent to stand trial, "that is, [petitioner]
11 understood the nature of the charges against him and was capable of
12 assisting in his defense;" (b) during the hearing, petitioner
13 "initiated a series of disruptive outbursts resulting in warnings from
14 the Court. After the Court's warnings to [petitioner] went unheeded,
15 the Court ordered [petitioner] removed from the courtroom...;" and (c)
16 after petitioner was removed from the courtroom, Dr. Backer testified
17 that, based in part upon petitioner's disruptive behavior at the
18 hearing (which Dr. Backer had witnessed), he had changed his opinion
19 and concluded that further evaluation of petitioner's competence would
20 be prudent. The Court concluded that the issue as to petitioner's
21 competence to stand trial was unresolved, and ordered petitioner
22 committed to the custody of the Attorney General of the United States
23 to be transported for further evaluation to determine petitioner's
24 competence to stand trial. [March 14, 2003 Order].

25 On April 7, 2003, the Court amended the March 14, 2003 Order. In
26 pertinent part, the April 7, 2003 Order states:

27 On March 14, 2003, the parties appeared for a competency
28 hearing pursuant to 18 U.S.C. § 4241(a). At the hearing,

1 the Court considered the "Forensic Evaluation" report
2 submitted by MDC/LA, heard the testimony of Dr. Rushton
3 Backer, observed defendant's behavior in court, and heard
4 and considered arguments and advice of counsel for the
5 United States and the defendant. On April 1, 2003, the
6 Court received the Forensic Evaluation Addendum prepared by
7 Dr. Backer, and the Court has read and considered this
8 Addendum as well as the balance of the entire record of this
9 case.

10 Based on the foregoing, the Court finds the following
11 by a preponderance of the evidence:

12 Defendant Steven William Sutcliffe is presently
13 suffering from a mental disease or defect rendering him
14 mentally incompetent to the extent that he is unable to
15 understand the nature and consequences of the proceedings
16 against him or to assist properly in his defense.

17 IT IS HEREBY ORDERED, based on this finding, that
18 pursuant to 18 U.S.C. § 4241(d), defendant Steven William
19 Sutcliffe is hereby committed into the custody of the
20 Attorney General of the United States, to be transported
21 forthwith to FMC Devens Massachusetts.... Pursuant to 18
22 U.S.C. § 4241(d)(1), defendant shall remain at FMC Devens
23 for a reasonable period of time, but not to exceed four
24 months, for the purpose of determining whether there is a
25 substantial probability that in the foreseeable future
26 defendant will attain the capacity to permit the trial to
27 proceed.

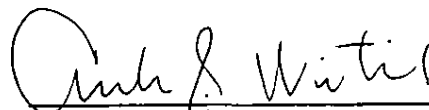
28 [April 7, 2003 Order].

1 Petitioner is currently in custody at FMC Devens. He is
2 scheduled to return to Los Angeles for a further competency hearing on
3 August 25, 2003. [April 7, 2003 Order].

4 Petitioner challenges his current detention, arguing that because
5 the Court did not make a competency determination, petitioner may not
6 be detained under 18 U.S.C. § 4241(d). Petitioner's challenge is
7 directed solely to the propriety of the March 14, 2003 Order. That
8 order, however, has been superseded by the amended order filed on
9 April 7, 2003. Because petitioner's current custody is the result of
10 the April 7, 2003 order (an order which does contain a finding that
11 petitioner is incompetent), petitioner's challenge to the March 14,
12 2003 Order is moot. Cf. United States Dept. of Treasury v. Galioto,
13 477 U.S. 556, 559-560 (1986) (amendment to statute mooted challenge to
14 previous version of statute).

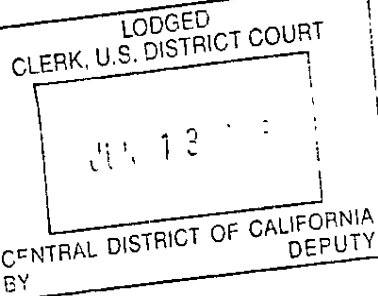
15 Accordingly, it is recommended that judgment be entered
16 dismissing the petition as moot.²

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18 DATED: 6.12.03

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20 

21 ANDREW J. WISTRICH
22 United States Magistrate Judge
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27 ² Although petitioner is not necessarily precluded from
28 challenging the April 7, 2003 Order, he must do so in a separate
habeas petition.



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

STEVEN WILLIAM SUTCLIFFE,)

Petitioner,)

v.)

UNITED STATES DISTRICT COURT,)
CENTRAL DISTRICT OF CALIFORNIA,)
ATTORNEY GENERAL FOR THE UNITED)
STATES,)

Respondents.)

No. CV 03-2810-MMM(AJW)

JUDGMENT

Judgment is hereby entered dismissing the petition as moot.

DATED: _____

MARGARET M. MORROW
United States District Judge